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California limited liability company

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

THAT ONE VIDEO
ENTERTAINMENT, LLC, a
California limited liability company,

Plaintiff,
vs.

KOIL CONTENT CREATION PTY
LTD., an Australian proprietary
limited company doing business as
NOPIXEL; MITCHELL CLOUT, an
individual; and DOES 1-25, inclusive,
Defendants.

CASE NO: 2:23-cv-02687 SVW (JCx)

[Assigned to the Hon. Stephen V. Wilson;
Ctrm 10A]

**PLAINTIFF'S OBJECTIONS TO
DEFENDANTS' EVIDENCE
PROFFERED IN SUPPORT OF THEIR
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
ADJUDICATION**

*[Response and [Proposed] Order Granting
Objections to the Declarations of Larry
Zerner, Mitchell Clout and Garry Kitchen
Filed Concurrently Herewith]*

Hearing

Date: September 9, 2024
Time: 1:30 p.m.
Dept.: Courtroom 10A (10th Floor)
350 W. First Street
Los Angeles, CA 90012
Judge: Hon. Stephen V. Wilson

**PLAINTIFF'S OBJECTIONS TO DEFENDANTS' EVIDENCE PROFFERED IN
SUPPORT OF THEIR OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY ADJUDICATION**

Pursuant to Federal Rule of Civil Procedure (“FRCP”) 56(c)(2), Plaintiff THAT ONE VIDEO ENTERTAINMENT, LLC, a California limited liability company (“TOVE” or “Plaintiff”) hereby objects to the following evidence presented by Defendants KOIL CONTENT CREATION PTY LTD., an Australian proprietary limited company doing business as NOPIXEL (“NoPixel”), and MITCHELL CLOUT, an individual (“Clout”) in Opposition to Plaintiff’s Motion for Summary Adjudication of Plaintiff’s First Cause of Action for Declaratory Relief in the First Amended Complaint (“FAC”) and set to be heard before this Court.

Defendants submit the Declarations of Defendant Clout, Larry Zerner, and Garry Kitchen, all of which make a number of conclusory allegations unsupported by facts, and which are therefore insufficient to create a genuine issue of material fact. *Hansen v. U.S.*, 7 F.3d 137, 138 (9th Cir. 1993). A more specific detailing of the deficiencies in such declarations is as follows:

DECLARATION OF LARRY ZERNER

1. Declaration of Larry Zerner, ¶ 2, 2:1-3

TOVE objects to the statement from Zerner that “Nowhere in the document does it state that Mr. Tracey is being hired to be loaned out to work at Koil,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

DECLARATION OF MITCHELL CLOUT

1. Declaration of Mitchell Clout, ¶ 3, 2:8

TOVE objects to the statement from Clout that Clout “own[s] 100% of Koil,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

2. Declaration of Mitchell Clout, ¶ 6, 2:14-17

TOVE objects to the statement from Clout that “At this time, Mr. Tracey, like all others before and after him, were required to agree to the community’s “terms and rules” (“Terms of Service” or “Terms”),” on the grounds that the statement is

conclusory. *Hansen*, 7 F.3d at 138.

3. Declaration of Mitchell Clout, ¶ 7, 2:18-2

TOVE objects to the statement from Clout that “Those terms, which remained in place throughout Mr. Tracey’s tenure, specified that any and all content creators creating content for or in the NoPixel servers granted Koil a ‘non-exclusive, permanent, irrevocable, unlimited license to use, publish, or re-publish’ Content in connection with the services they provided, but that they would retain copyright over the Content. ‘Content’ is defined in the terms of service as ‘All content you submit, upload, or otherwise make available to the Service.’,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

4. Declaration of Mitchell Clout, ¶ 8, 3:3-6

TOVE objects to the statement from Clout that “The Terms of Service further states that Koil may ‘remove or modify any Content submitted at any time, with or without cause, with or without notice; and that Koil may terminate ‘access to all or any part of the Service at any time, with or without cause, with or without notice’,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

5. Declaration of Mitchell Clout, ¶ 9, 3:6-10

TOVE objects to the statement from Clout that “Mr. Tracey agreed to the terms of service at the time he joined,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

6. Declaration of Mitchell Clout, ¶ 10, 3:11-16

TOVE objects to the statement from Clout that “At no time did Koil or NoPixel, or the Terms, ever make any distinction as to whom the Terms applied. They applied to all content uploaded or submitted by those providing said content, regardless of whether they were ‘developers’, ‘players’ or otherwise. At no time was there ever a “separate” or “more formal” process by which developers were subject

1 to any other terms. These are the terms that I intended all persons who signed up to
2 provide content to the NoPixel server to abide by,” on the grounds that the statement
3 is conclusory. *Hansen*, 7 F.3d at 138.

4 **7. Declaration of Mitchell Clout, ¶ 11, 3:17-4:7**

5 TOVE objects to the statement from Clout that “Regarding those
6 contributions, it is my understanding, based on my review of the Complaint, that
7 either TOVE or Mr. Tracey are claiming that the code that Mr. Tracey wrote for the
8 NoPixel server is a “joint work” as that term has been explained to me under United
9 States Copyright laws and that either Mr. Tracey or TOVE is a ‘joint author’ of the
10 code. This is untrue. I have never intended that Mr. Tracey or TOVE to be a ‘joint
11 author’ of the NoPixel code. That is why the terms of service expressly state that all
12 the contributors continue to fully own the code that they submit, they are just
13 providing Koil with a license to use the code. I have never told Mr. Tracey or TOVE
14 that I considered them to be joint authors, and prior to this lawsuit, Mr. Tracey never
15 told me that he considered himself or TOVE to be a joint author. Had he ever said
16 anything like that to me, I would have immediately told him that was not the case so
17 that there would be no confusion,” on the grounds that the statement is conclusory.
18 *Hansen*, 7 F.3d at 138. TOVE further objects to this paragraph on the grounds that
19 such statements constitute a legal conclusion.

20 **8. Declaration of Mitchell Clout, ¶ 12, 4:7-11**

21 TOVE objects to the statement from Clout that “In fact, I have never had any
22 agreement whatsoever with TOVE. Nor have I had any communication with TOVE,
23 whether orally or in writing; and I was unaware of their existence or alleged
24 involvement/ownership in any content until this lawsuit. The only agreement I had
25 with Mr. Tracey in connection with ownership or licensing of the content is
26 contained within the Terms,” on the grounds that the statement is conclusory.
27 *Hansen*, 7 F.3d at 138. TOVE further objects to this paragraph on the basis that this

1 testimony is contradicted by Clout's testimony during his deposition. *See* Deposition
2 of Michell Clout as the Person Most Knowledgeable for NoPixel ("Clout Depo")
3 138:2-13; 145:9-146:24; 147:11-148:23; Exhibits "13" and "16" thereto. Clout
4 cannot now make contradictory statements in order to create a genuine issue of
5 material fact. *See See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir.
6 2009) ("The general rule in the Ninth Circuit is that a party cannot create an issue of
7 fact by an affidavit contradicting his prior deposition testimony.") (internal citations
8 omitted).

9 **9. Declaration of Mitchell Clout, ¶ 13, 4:12-16**

10 TOVE objects to the statement from Clout that "In that regard, the
11 contributions made by Mr. Tracey were part of a much larger community of work
12 contributed by over a hundred other developers. In other words, Mr. Tracey was
13 only one of many developers that contributed work to the NoPixel servers, with all
14 said work incorporated into the work with the content provided by all developers,"
15 on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138. TOVE
16 further objects to this paragraph on the basis that this testimony is contradicted by
17 evidence presented in this matter and by Clout's testimony during his deposition *See*
18 Clout Depo at 145:9-146:24; 147:11-148:23; Exhibit "16" thereto. Clout cannot now
19 make contradictory statements in order to create a genuine issue of material fact. *See*
20 *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) ("The
21 general rule in the Ninth Circuit is that a party cannot create an issue of fact by an
22 affidavit contradicting his prior deposition testimony.") (internal citations omitted).

23 **10. Declaration of Mitchell Clout, ¶ 14, 4:16-19**

24 TOVE objects to the statement from Clout that "Further, because there were
25 contributions from dozens of developers, I and Koil were responsible for overseeing
26 and coordinating the work and content submissions. In fact, Mr. Tracey's
27 contributions to the overall work contained on the servers was less than one percent

1 of the total code,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at
2 138.

3 **11. Declaration of Mitchell Clout, ¶ 15, 4:20-5:2**

4 TOVE objects to the statement from Clout that “I am the sole owner of Koil,
5 and I have always been and continue to be the person who is responsible for what is
6 put on the NoPixel server. It was I and Koil, and not Mr. Tracey, that supervises and
7 controls the work, its use and exploitation on the servers. I have the final say on
8 everything that is added to the server,” on the grounds that the statement is
9 conclusory. *Hansen*, 7 F.3d at 138.

10 **12. Declaration of Mitchell Clout, ¶ 16, 5:3-12**

11 TOVE objects to the statement from Clout that “Contrary to TOVE’s claims,
12 Mr. Tracey was not the ‘lead developer,’ nor was he responsible for managing the
13 work of other developers or handling technical operations and infrastructure
14 development. He did deploy code, fix bugs, and assist in ensuring the server ran
15 properly, and he ran the infrastructure side of the development (but not development
16 of the game). All of Mr. Tracey’s work was ultimately subject to the direction of
17 Koil, who remained responsible for coordinating, overseeing and ultimately
18 implementing the contributions made by the dozens of deployed developers. While
19 it is true that Mr. Tracey did aid in building in-game mechanics and reviewing
20 development ideas, that in no way made Mr. Tracey the “lead” developer or
21 anything other than one of many contributors,” on the grounds that the statement is
22 conclusory. *Hansen*, 7 F.3d at 138. TOVE further objects to this paragraph on the
23 basis that this testimony is contradicted by evidence presented in this matter and by
24 Clout’s testimony during his deposition *See* Clout Depo at 145:9-146:24; 147:11-
25 148:23; Exhibit “16” thereto. Clout cannot now make contradictory statements in
26 order to create a genuine issue of material fact. *See See Van Asdale v. Int’l Game*
27 *Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) (“The general rule in the Ninth Circuit is

1 that a party cannot create an issue of fact by an affidavit contradicting his prior
2 deposition testimony.”) (internal citations omitted).

3 **13. Declaration of Mitchell Clout, ¶ 17, 5:13-16**

4 TOVE objects to the statement from Clout that “And Mr. Tracey was
5 certainly not, at any time or in any way, the ‘primary contributor to the back-end
6 source code of the NoPixel Server.’ His work was a small percentage of the overall
7 work performed by many, many, other developers and it was always under my
8 management and control,” on the grounds that the statement is conclusory. *Hansen*,
9 7 F.3d at 138. Furthermore, Clout is not qualified to provide testimony to rebut
10 Plaintiff’s expert testimony. *See Fresenius Med. Care Holdings, Inc. v. Baxter Int’l,*
11 *Inc.*, No. 597, 2006 WL 1330002, at *3 (N.D. Cal. May 15, 2006) (“Lay opinion
12 testimony is ‘not to provide specialized explanations or interpretations that an
13 untrained layman could not make if perceiving the same acts or events.’”) (internal
14 citations omitted).

15 **14. Declaration of Mitchell Clout, ¶ 18, 5:16-18**

16 TOVE objects to the statement from Clout that “During the period that Mr.
17 Tracey was working for Koil, there were approximately 10 other salaried developers
18 working for Koil on the NoPixel server,” on the grounds that the statement is
19 conclusory. *Hansen*, 7 F.3d at 138.

20 **15. Declaration of Mitchell Clout, ¶ 19, 5:18-20**

21 TOVE objects to the statement from Clout that “Mr. Tracey was never
22 credited as a co-author of the server, nor were any of the other developers. The
23 credited owner of the NoPixel server is Koil,” on the grounds that the statement is
24 conclusory. *Hansen*, 7 F.3d at 138.

25 **16. Declaration of Mitchell Clout, ¶ 20, 5:20-6:5**

26 TOVE objects to the statement from Clout that “I have also been made aware
27 that Mr. Tracey and TOVE claim the nature of their claimed work was to build the

1 payment processing system. Nothing could be further from the truth. In fact, at all
2 times, even before Mr. Tracey began making these alleged contributions, Koil
3 utilized the third-party platform provider Tebex to process payments. The only work
4 Tracey performed, therefore, was limited to creating some additional code to
5 facilitate interaction with the Tebex payment platform,” on the grounds that the
6 statement is conclusory. *Hansen*, 7 F.3d at 138.

7 **17. Declaration of Mitchell Clout, ¶ 21, 6:6-11**

8 TOVE objects to the statement from Clout that “And the agreement Koil had
9 for that work was never with TOVE. At no time, ever, did I enter into any
10 agreement for TOVE to ‘loan out’ the services of Mr. Tracey to Koil. At no time
11 was I ever informed by Mr. Tracey or TOVE or anyone else that he was performing
12 said work for TOVE or on TOVE’s behalf. The first I heard of this was when the
13 claims in this case were made. Neither did I ever enter into a contract to pay TOVE
14 50% of NoPixel’s revenue,” on the grounds that the statement is conclusory.
15 *Hansen*, 7 F.3d at 138.

16 **18. Declaration of Mitchell Clout, ¶ 22, 6:12-19**

17 TOVE objects to the statement from Clout that “Further to the foregoing, the
18 only arrangement Koil had was with Mr. Tracey, and Mr. Tracey alone. In fact, for
19 these services Koil agreed to compensate Mr. Tracey, and only Mr. Tracey, who
20 was paid directly. At no point did Koil ever pay TOVE or was I aware of their
21 existence, save for two invoices that Mr. Tracey submitted for payment that had
22 TOVE’s email on it. Still, Mr. Tracey immediately informed me those invoices,
23 which I paid, were submitted in error; after which the payments were reversed, new
24 invoices submitted and were paid. All such payments, without exception, were made
25 to Mr. Tracey’s personal PayPal account (D@nny.co),” on the grounds that the
26 statement is conclusory. *Hansen*, 7 F.3d at 138.

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1 **19. Declaration of Mitchell Clout, ¶ 23, 6:20-7:3**

2 TOVE objects to the statement from Clout that “The foregoing payments
3 began in May 2021, when we started paying Mr. Tracey directly (via deposits to his
4 personal PayPal account) totalling approximately \$10,000.00 per month. At no point
5 did Mr. Tracey or TOVE ever inform me that Mr. Tracey began working for TOVE
6 and that payments should be made to TOVE, rather than Mr. Tracey,” on the
7 grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

8 **20. Declaration of Mitchell Clout, ¶ 24, 7:4-10**

9 TOVE objects to the statement from Clout that “But to be clear, Koil’s
10 agreement to start paying Mr. Tracey was not due to the alleged ‘commercial
11 success’ of Mr. Tracey’s contributions. Rather, it was to fairly compensate Mr.
12 Tracey for his work. Period. In fact, the commercial success of the NoPixel servers
13 was because of the game itself and the people (including many very famous
14 streamers) who used NoPixel and the playable modification made by the dozens of
15 contributors, and not because Mr. Tracey made a small contribution toward
16 facilitating the payment processing,” on the grounds that the statement is
17 conclusory. *Hansen*, 7 F.3d at 138.

18 **21. Declaration of Mitchell Clout, ¶ 25, 7:10-19**

19 TOVE objects to the statement from Clout that “Significantly, at no time did I
20 or Koil ever agree to ‘make Mr. Tracey a 50% partner in the NoPixel Server.’ In
21 fact, that is demonstrably false. What we did agree to was to give Mr. Tracey a
22 revenue share on just four of the many NoPixel Servers. Namely, the priority queue
23 sales of the White Priority Server, the India Server, the Spain Server and the South
24 America Server only while he was working for NoPixel and delivering the promised
25 products, helping the infra team and also developing 4 mods monthly, one including
26 Red Dead Redemption which he never completed. That was it. And, while this
27 agreement was in writing on Discord, there is no written or oral agreement with

1 anyone, at any time, that Koil would pay Tracey (or TOVE) on 50% of all servers or
2 otherwise make him a ‘partner.’,” on the grounds that the statement is conclusory.
3 *Hansen*, 7 F.3d at 138.

4 **22. Declaration of Mitchell Clout, ¶ 26, 7:20-8:4**

5 TOVE objects to the statement from Clout that “In addition to the foregoing, I
6 wish to address the claim, as stated in Plaintiff’s Separate Statement of Undisputed
7 Facts, that Mr. Tracey was a ‘talented’ developer and that I ‘defamed’ him. First,
8 Mr. Tracey was serviceable as a developer but no more talented than the dozens of
9 other developers that were working for Koil. More importantly, however, at no time
10 did I ever “defame” Mr. Tracey,” on the grounds that the statement is conclusory.
11 *Hansen*, 7 F.3d at 138.

12 **DECLARATION OF GARRY KITCHEN**

13 **1. Declaration of Garry Kitchen, ¶ 2, 1:26-2:3**

14 TOVE objects to the statement from Kitchen that he “understand[s] this is a
15 business dispute,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at
16 138.

17 **2. Declaration of Garry Kitchen, ¶ 3, 2:4-6**

18 TOVE objects to the statement from Kitchen that Mr. Tracey “agreed to the
19 community’s *terms and rules*,” on the grounds that the statement is conclusory.
20 *Hansen*, 7 F.3d at 138.

21 **3. Declaration of Garry Kitchen, ¶ 6, 2:14-17**

22 TOVE objects to the statement from Kitchen that “Around the end of
23 December of 2022, Mr. Tracey was terminated by KOIL/ NOPIXEL. Upon his
24 departure, KOIL/NOPIXEL continued to use Mr. Tracey's work product under the
25 "non-exclusive, permanent, irrevocable, unlimited license" granted under the terms
26 and rules to which Mr. Tracey agreed,” on the grounds that the statement is
27 conclusory. *Hansen*, 7 F.3d at 138. TOVE further objects to this paragraph on the

1 grounds that Kitchen is not permitted to provide legal conclusions. *United States v.*
2 *Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) (“[A]n expert cannot testify to a matter
3 of law amounting to a legal conclusion”).

4 **4. Declaration of Garry Kitchen, ¶ 29, 8:5-22**

5 TOVE objects to the statements in subsections A-B on the grounds that the
6 statements therein are conclusory. *Hansen*, 7 F.3d at 138.

7 **5. Declaration of Garry Kitchen, ¶ 30, 8:23-9:15**

8 TOVE objects to the statements in subsections A-C on the grounds that the
9 statements therein are conclusory. *Hansen*, 7 F.3d at 138.

10 **6. Declaration of Garry Kitchen, ¶ 31, 9:16-21**

11 TOVE objects to the statement from Kitchen that “There are numerous false
12 claims that have been made about the alleged code that Mr. Tracey authored during
13 his time working on the NoPixel project. For example, Plaintiff’s attorneys states:
14 ‘Mr. Tracey designed and created the entire payment processing system utilized by
15 the NoPixel Server, which has facilitated the processing of millions of dollars in
16 payments to Defendants.’,” on the grounds that the statement is conclusory. *Hansen*,
17 7 F.3d at 138. TOVE further objects to this paragraph on the grounds that Kitchen is
18 not permitted to provide legal conclusions. *United States v. Tamman*, 782 F.3d 543,
19 552 (9th Cir. 2015) (“[A]n expert cannot testify to a matter of law amounting to a
20 legal conclusion”).

21 **7. Declaration of Garry Kitchen, ¶ 36, 11:1-10**

22 TOVE objects to the statement from Kitchen that “[a] review of Mr. Francis’
23 report reveals that, as of February 2022, not only was Tracey’s BACKEND CODE
24 not complete (as it is referred to as “code he was developing”), but in fact, as of
25 February 2022, it appears that he was just getting started on it” on the grounds that
26 the statement is conclusory. *Hansen*, 7 F.3d at 138.

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1 **8. Declaration of Garry Kitchen, ¶ 37, 11:11-17**

2 TOVE objects to the statement from Kitchen that “all of the claims listed
3 above... are referring to Tracey’s BACKEND CODE, which was not complete as of
4 February 2022,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at
5 138.

6 **9. Declaration of Garry Kitchen, ¶ 38, 11:18-19**

7 TOVE objects to the statement from Kitchen that “Based on these facts, there
8 is no way that Tracey's BACKEND CODE performs as claimed by the Plaintiffs,”
9 on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

10 **10. Declaration of Garry Kitchen, ¶ 39, 11:20-24**

11 TOVE objects to the statement from Kitchen that “In fact, Mr. Tracey could
12 not have designed and created the entire payment processing system utilized by the
13 NoPixel Server because NoPixel's current 3rd party payment processing solution -
14 TEBEX - has been running in the NoPixel project since approximately June of 2021,
15 well before Tracey's alleged BACKEND CODE was even started,” on the grounds
16 that the statement is conclusory. *Hansen*, 7 F.3d at 138.

17 **11. Declaration of Garry Kitchen, ¶ 45, 13:7-13**

18 TOVE objects to the statement from Kitchen that “As evidenced by this
19 commit (Exhibit 3), the work was performed by nikez. Mr. Tracey's BACKEND
20 CODE, as referenced by Mr. Francis, had nothing to do with the initial setup of the
21 payment system as said BACKEND CODE of Mr. Tracy didn't exist in June of
22 2021,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

23 **12. Declaration of Garry Kitchen, ¶ 47, 13:20-22**

24 TOVE objects to the statement from Kitchen that “Therefore: Mr. Tracey
25 never ‘*designed and built an entire payment processing system utilized by the*
26 *NoPixel Server, which has facilitated the processing of millions of dollars in*
27 *payments to Defendants.*’,” on the grounds that the statement is conclusory. *Hansen*,

7 F.3d at 138. TOVE objects to this paragraph on the grounds that it is irrelevant, because the terms quoted in the Terms of Service were updated on December 27, 2023, after the relevant time period of events alleged in this action. TOVE further objects to this paragraph on the grounds that Kitchen is not permitted to provide legal conclusions. *United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) (“[A]n expert cannot testify to a matter of law amounting to a legal conclusion”).

13. Declaration of Garry Kitchen, ¶ 48, 13:23-26

TOVE objects to the statement from Kitchen that “Mr. Francis’ claim that Mr. Tracey’s BACKEND CODE provides the services listed above (*paragraph 32 of this declaration*) is simply not true, confirmed by the fact that Mr. Francis fails to cite any files, functions, or other code as proof of the claimed functionality,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

14. Declaration of Garry Kitchen, ¶ 51, 14:13-17

TOVE objects to the statement from Kitchen that “In summary, the impressive financial and business operation capabilities Plaintiff and their expert have attributed to Mr. Tracey’s code are in fact the result of NOPIXEL’s deployment of TEBEX, which has been deployed as NOPIXEL’s transactional partner since June of 2021, well before Mr. Tracey wrote the code in question,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

15. Declaration of Garry Kitchen, ¶ 52, 14:21-15:4

TOVE objects to the statement from Kitchen that “Whether that is a right or wrong way to determine value, the theory was (I believe) if a project was 10,000 lines of code (or submits/revisions/whatever metric) and Danny was responsible for 5,000 of those, then his contribution would be calculated at 50%. And if the hypothetical 10,000 line project made \$100,000, then Plaintiff would negotiate for 50% of the revenue, or \$50,000” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

1 **16. Declaration of Garry Kitchen, ¶ 53, 15:5-8**

2 TOVE objects to the statement from Kitchen that “I do not advocate this
3 method as applied to this dispute; and I do not feel that a programmer should be
4 compensated a percentage of revenue based on his effort as it relates to the project
5 whole,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

6 **17. Declaration of Garry Kitchen, ¶ 54, 15:9-17**

7 TOVE objects to the statement from Kitchen that “,But the method (whether I
8 support it or not) is not valid unless you are including all of the effort that went into
9 the entire project. This is where Mr. Francis' calculation goes ‘off the rails,’ as he
10 explicitly limited his analysis to a small portion of the product from which
11 NOPIXEL generated revenues” on the grounds that the statement is conclusory.
12 *Hansen*, 7 F.3d at 138.

13 **18. Declaration of Garry Kitchen, ¶ 55, 15:18-16:2**

14 TOVE objects to the statement from Kitchen that “In other words, rather than
15 calculating the percentage of effort that the identified BACKEND CODE repository
16 represents (the numerator) as compared to the total effort on the project as a whole
17 (the denominator), Mr. Francis carves away portions of the overall project, thus
18 making the denominator smaller,” on the grounds that the statement is conclusory.
19 *Hansen*, 7 F.3d at 138.

20 **19. Declaration of Garry Kitchen, ¶ 56, 16:3-8**

21 TOVE objects to the statement from Kitchen that “In other words, Mr.
22 Francis’ conclusion and opinion is essentially: Tracey did not do much work on the
23 GAME CODE so let's not include it in the denominator. The smaller the
24 denominator, the bigger the percentage. In fact, if we were to eliminate every line of
25 code that Danny did not write, the numerator and the denominator would be the
26 same number, and the percentage would be 100%,” on the grounds that the
27 statement is conclusory. *Hansen*, 7 F.3d at 138.

1 **20. Declaration of Garry Kitchen, ¶ 57, 16:8-19**

2 TOVE objects to the statement from Kitchen that “Basically, if you narrow
3 the definition of the ‘pond’ enough, even the smallest minnow will appear to be the
4 ‘big fish’. As a result of only considering the ‘small pond’, Mr. Francis was able to
5 make improper sweeping generalizations,” on the grounds that the statement is
6 conclusory. *Hansen*, 7 F.3d at 138.

7 **21. Declaration of Garry Kitchen, ¶ 58, 16:20-25**

8 TOVE objects to the statement from Kitchen that “Essentially, what Mr.
9 Francis is doing is identifying a repository that was Danny's personal repository
10 where he did his work, and then calculating a percentage of the work that he did in
11 his own repository. With that understanding, I'm surprised the numbers aren't
12 higher. In a nutshell, Mr. Francis’ conclusions and his inflated percentages are the
13 result of careful tailoring of ‘the code base being discussed’ and result in
14 overinflated conclusions,’ on the grounds that the statement is conclusory. *Hansen*,
15 7 F.3d at 138.

16 **22. Declaration of Garry Kitchen, ¶ 59, 17:2-11**

17 TOVE objects to the statement from Kitchen that “This would mean that if
18 you summed the statistics of those two repositories, you would have the totals for
19 the entire project. *This is confirmed by Mr. Francis when he states on pages 11-12*
20 *of his report that the KOIL spreadsheet did not include the MANAGEMENT API &*
21 *DASHBOARD REPOSTIROY, which was a repository outside of ITSKOIL/nopixel*”
22 on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

23 **23. Declaration of Garry Kitchen, ¶ 60, 17:11-15**

24 TOVE objects to the statement from Kitchen that “Therefore, to find the
25 correct percentage of Tracey’s contribution, I took the statistics from
26 ITSKOIL/nopixel-mgmt-api and divided those numbers by the entire project, as
27 comprised of the summation of statistics from ITSKOIL/nopixel- mgmt-api and

1 ITSKOIL/nopixel,” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d
2 at 138.

3 **24. Declaration of Garry Kitchen, ¶ 62, 17:25-28**

4 TOVE objects to the statement from Kitchen that “To calculate the percentage
5 that Mr. Tracey's code contributes to the overall project for each category, I divided
6 the nopixel-mgmt-api statistics by the totals for the entire project, as represented by
7 the summation of the stats of nopixelmgmt- api and nopixel,” on the grounds that
8 the statement is conclusory. *Hansen*, 7 F.3d at 138.

9 **25. Declaration of Garry Kitchen, ¶ 63, 18:1-7**

10 TOVE objects to the statement from Kitchen that “to calculate a total
11 percentage of contribution, *I used Mr. Francis' chosen methodology* of averaging
12 the five calculated averages above ... **That calculation results in a total**
13 **contribution percentage for Mr. Tracey's code when compared to the entire**
14 **NOPIXEL project of 0.57%”** on the grounds that the statement is conclusory.
15 *Hansen*, 7 F.3d at 138.

16 **26. Declaration of Garry Kitchen, ¶ 66, 18:19-22**

17 TOVE objects to the statement from Kitchen that “Mr. Francis’ “Findings” on
18 pages 8-11 of his report (which include the overinflated percentages of DW’s
19 contribution as discussed above) show that *no effort was made to identify source*
20 *code from any of the myriad other file types in any of the commits in his analysis”*
21 on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

22 **27. Declaration of Garry Kitchen, ¶ 68, 19:1-2**

23 TOVE objects to the statement from Kitchen that “Thus *Mr. Francis’*
24 *“findings” cannot be relied upon in any analysis fo DW’s contribution of source*
25 *code to the project”* on the grounds that the statement is conclusory. *Hansen*, 7 F.3d
26 at 138.

27 ///

1 **28. Declaration of Garry Kitchen, ¶ 69, 19:5-12**

2 TOVE objects to the statement from Kitchen that he “disagree[s]” with Mr.
3 Francis’ conclusion in his Supplemental Expert Report, on the grounds that the
4 statement is conclusory. *Hansen*, 7 F.3d at 138.

5 **29. Declaration of Garry Kitchen, ¶ 70, 19:13-21**

6 TOVE objects to the statement from Kitchen that “In fact, Mr. Francis offers
7 no concrete evidence that his Scenario A process actually works. Even with access
8 to the project source, *Mr. Francis fails to cite any lines of code which prove that the*
9 *navigational flow that he describes would successfully allow one to access the site*
10 *and upload code and assets without having agreed to the terms of service.* In fact, if
11 the Scenario A process actually worked as claimed, there is no reason that Mr.
12 Francis could not have simply submitted a video of himself performing the process
13 one step at a time as described in his analysis, thus demonstrating that Scenario A is
14 a valid way to access the site without having agreed to the terms of service. Mr.
15 Francis offers no such proof,” on the grounds that the statement is conclusory.
16 *Hansen*, 7 F.3d at 138.

17 **30. Declaration of Garry Kitchen, ¶ 71, 19:23-25**

18 TOVE objects to the statement from Kitchen that “In fact, Mr. Francis’
19 conclusion that the Scenario A process as described would allow one to join and
20 play on the NOPIXEL server without completing the STANDARD ONBOARDING
21 process cannot occur,” on the grounds that the statement is conclusory. *Hansen*, 7
22 F.3d at 138.

23 **31. Declaration of Garry Kitchen, ¶ 72, 19:25-20:3**

24 TOVE objects to the statement from Kitchen that “it is important to note that
25 [Mr. Francis] phrases a hypothetical user's actions in the present tense - “it **is**
26 possible, and in more than one way, to join and play on the NOPIXEL SERVER
27 without having to complete...” The correct question is whether or not it was possible

1 in 2020, when Mr. Tracey registered on the website (which is April 22, 2020; *see*
2 *MC 0044-MC 0046*). In that context, *Mr. Francis' analysis is irrelevant as it does*
3 *not reflect how the site worked in or around April of 2020,”* on the grounds that the
4 statement is conclusory. *Hansen*, 7 F.3d at 138. TOVE further objects to this
5 paragraph on the grounds that Kitchen is not permitted to provide legal conclusions,
6 specifically as to when Mr. Tracey registered on the website. *United States v.*
7 *Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) (“[A]n expert cannot testify to a matter
8 of law amounting to a legal conclusion”).

9 **32. Declaration of Garry Kitchen, ¶ 73, 20:4-9**

10 TOVE objects to the statement from Kitchen that “This becomes obvious
11 when one reviews the process of Scenario A by which Mr. Francis claims that one
12 would bypass the standard onboarding process, as described on page 18,” on the
13 grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

14 **33. Declaration of Garry Kitchen, ¶ 74, 20:11-15**

15 TOVE objects to the statement from Kitchen that “I assume that these are the
16 ‘connect’ buttons that Mr. Francis is referring to,” on the grounds that the statement
17 is conclusory. *Hansen*, 7 F.3d at 138.

18 **34. Declaration of Garry Kitchen, ¶ 75, 20:16-22**

19 TOVE objects to the statement from Kitchen that “However, in the 2020
20 timeframe in which Mr. Tracey first registered for the community, *there were no*
21 *‘connect’ buttons on the www.nopixel.net website for the user to click on.* In fact, as
22 shown on Exhibit 9 is an image from YouTube video – ‘How to Join the MOST
23 POPULAR GTA 5 RP Servers! (NoPixel, RedlineRP, GTA:World, and more!)’.
24 This shows that, as of October 26, 2020 (the video publication date), there were
25 choices to ‘Log in’ and ‘Register’ (highlighted) but *there was no button to directly*
26 *connect,”* on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

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1 **35. Declaration of Garry Kitchen, ¶ 76, 20:23-21:2**

2 TOVE objects to the statement from Kitchen that “Approximately seven (7)
3 months after the above referenced www.nopixel.com design, a small design change
4 was made, as evidenced by the video cite contained on **Exhibit 10**, published on
5 YouTube in May of 2021. While similar to the previous version of
6 www.nopixel.com (above), this update added the ability to ‘login using discord’ (a
7 popular multiplayer gaming helper application), once again highlighted in red.
8 However, of note, as of May of 2021, *there were still no ‘connect’ buttons as*
9 *required by Mr. Francis’ suggested method of entry into the site”* on the grounds
10 that the statement is conclusory. *Hansen*, 7 F.3d at 138.

11 **36. Declaration of Garry Kitchen, ¶ 77, 21:3-6**

12 TOVE objects to the statement from Kitchen that “I also confirmed through
13 archive.org that, as of May 1, 2021, www.nopixel.net *did not offer a way for a user*
14 *to directly connect to a server*. This is attached hereto as **Exhibit 11** (noting the
15 archive.org date notation in the upper right corner of the image,” on the grounds that
16 the statement is conclusory. *Hansen*, 7 F.3d at 138.

17 **37. Declaration of Garry Kitchen, ¶ 78, 21:7-10**

18 TOVE objects to the statement from Kitchen that “*Mr. Francis’ claim that the*
19 *Scenario A process as described would allow one to join and play on the NOPIXEL*
20 *server without completing the STANDARD ONBOARDING process is, therefore,*
21 *incorrect,”* on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

22 **38. Declaration of Garry Kitchen, ¶ 79, 21:11-14**

23 TOVE objects to the statement from Kitchen that “*In fact, the attached*
24 *evidence proves that the Scenario A method that Mr. Francis claims would enable*
25 *one to bypass the Terms and Rules agreement was not available as of at least May*
26 *1, 2021, and possibly later, at least a year after Mr. Tracey is recorded as*
27 *registering (April 22, 2020)”* on the grounds that the statement is conclusory.

1 *Hansen*, 7 F.3d at 138. TOVE further objects to this paragraph on the grounds that
2 Kitchen is not permitted to provide legal conclusions, specifically as to when Mr.
3 Tracey registered on the website. *United States v. Tamman*, 782 F.3d 543, 552 (9th
4 Cir. 2015) (“[A]n expert cannot testify to a matter of law amounting to a legal
5 conclusion”).

6 **39. Declaration of Garry Kitchen, ¶ 80, 21:15-22**

7 TOVE objects to the statement from Kitchen that “In addition, to the extent
8 that one was to question the authenticity of the documents (*MC 0044-MC 0046*),
9 which show Tracey's registration date on the site of April 22, 2020, *an equally*
10 *relevant and irrefutable date is July 31, 2020, which is documented by Github as the*
11 *first date that Mr. Tracey made a code commit to one of the Koil nopixel source*
12 *repositories, specific itsKoil/nopixel, as shown below left (the list of commits on*
13 *July 31, 2020) and the activity report of 2020, showing that Mr. Tracey's code work*
14 *started at the end of July of that year. Exhibit 12,” on the grounds that the statement*
15 *is conclusory. Hansen*, 7 F.3d at 138. TOVE further objects to this paragraph on the
16 grounds that Kitchen is not permitted to provide legal conclusions, specifically as to
17 when Mr. Tracey registered on the website, and as to what constitutes a “relevant”
18 date. *United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) (“[A]n expert
19 cannot testify to a matter of law amounting to a legal conclusion”).

20 **40. Declaration of Garry Kitchen, ¶ 81, 21:23-27**

21 TOVE objects to the statement from Kitchen that “In other words, even if one
22 were to question the date of Mr. Tracey's registration, *it is irrefutable that Mr.*
23 *Francis' Scenario A process could not have been used to bypass the Terms and*
24 *Rules agreement until well after Mr. Tracey began submitting code to the NOPIXEL*
25 *project,*” on the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138.

26 **41. Declaration of Garry Kitchen, ¶ 82, 21:27-22:3**

27 TOVE objects to the statement from Kitchen that “In addition, the Scenario A

1 flowchart presented by Mr. Francis on page 20 of his supplemental report is no
2 longer valid because, as I've shown above, *at the time when Mr. Tracey joined the*
3 *organization, the 'connect' button, which would activate the 'Attempt Join Server'*
4 *function and start the Scenario A flow, was not available on*
5 *https://www.nopixel.com. **Exhibit 13,***" on the grounds that the statement is
6 conclusory. *Hansen*, 7 F.3d at 138.

7 **42. Declaration of Garry Kitchen, ¶ 83, 22:4-11**

8 TOVE objects to the statement from Kitchen that "While it is not explicitly
9 stated as such, in my opinion, a software expert such as Mr. Francis would
10 understand the above request for opinion to be referring to the codebase we have
11 examined **running under normal operation,**" on the grounds that the statement is
12 conclusory. *Hansen*, 7 F.3d at 138.

13 **43. Declaration of Garry Kitchen, ¶ 84, 22:12-16**

14 TOVE objects to the statement from Kitchen that "Scenario B suggests that a
15 third party individual with ADMIN credentials may have helped Mr. Tracey bypass
16 the terms of service of the website," on the grounds that the statement is conclusory.
17 *Hansen*, 7 F.3d at 138.

18 **44. Declaration of Garry Kitchen, ¶ 85, 22:17-23**

19 TOVE objects to the statement from Kitchen that "First, this is not a valid
20 answer to the question being proposed. Mr. Francis has been asked to opine on
21 whether **the codebase that we have been examining, running under normal**
22 **operation,** allows an individual to access the NOPIXEL servers without agreeing to
23 the terms of service. In other words, whether there anything that a user can do
24 during the normal and regular onboarding process **as it is written in the examined**
25 **codebase** to skip the point at which they must agree to the terms of service and still
26 join and play on the server," on the grounds that the statement is conclusory.
27 *Hansen*, 7 F.3d at 138.

1 **45. Declaration of Garry Kitchen, ¶ 86, 22:24-28**

2 TOVE objects to the statement from Kitchen that “Scenario B, as offered by
3 Mr. Francis, suggests having a third party, such as an ADMIN, run **software**
4 **routines that would not normally run in the registration and login onboard**
5 **process.** This scenario clearly violates the spirit of the analysis, which is specifically
6 asking about the operation of the normal and regular onboarding process **as it is**
7 **written in the examined codebase,”** on the grounds that the statement is
8 conclusory. *Hansen*, 7 F.3d at 138.

9 **46. Declaration of Garry Kitchen, ¶ 87, 23:1-9**

10 TOVE objects to the statement from Kitchen that “Mr. Francis is describing a
11 very serious scenario, in which a 3rd party ADMIN (or Koil employee) stepped in to
12 bypass the security safeguards in the system in order to allow an outsider to bypass
13 the terms of service of the site. A breach of this nature could very well lead to a
14 situation where one could attempt to falsely claim ownership of intellectual property
15 that has been uploaded to the NOPIXEL server. If Mr. Francis believes that such a
16 scenario was used when Mr. Tracey joined the NOPIXEL community, further
17 investigation (even potentially criminal in nature) may need to be undertaken,” on
18 the grounds that the statement is conclusory. *Hansen*, 7 F.3d at 138. TOVE objects
19 to this paragraph on the grounds that Kitchen is not permitted to provide legal
20 conclusions, specifically, what constitutes a “breach,” the results and/or
21 consequences thereof, or any criminal activity. *United States v. Tamman*, 782 F.3d
22 543, 552 (9th Cir. 2015) (“[A]n expert cannot testify to a matter of law amounting to
23 a legal conclusion”). TOVE objects to this paragraph as the opinions provided
24 therein go beyond the scope and/or purpose of Kitchen’s expert report and/or
25 analysis. TOVE further objects to this paragraph to the extent it is irrelevant when
26 determining TOVE’s causes of action in the First Amended Complaint.

27 ///

1 DATED: August 26, 2024

ALTVIEW LAW GROUP, LLP

2
3 By: /s/ John M. Begakis, Esq.

JOHN M. BEGAKIS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing electronically filed document has been served via a “Notice of Electronic Filing” automatically generated by the CM/ECF System and sent by e-mail to all attorneys in the case who are registered as CM/ECF users and have consented to electronic service pursuant to L.R. 5-3.3.

Dated: August 26, 2024

By: /s/ John Begakis
John M. Begakis